

RECOMMENDATIONS FOR FURTHER EAC ACTIVITY ON VOTER FRAUD AND INTIMIDATION

Consultant Recommendations

- **Greatly expand the scope of individuals interviewed.** Time and resource constraints prevented the consultants from interviewing the full range of participants in the electoral process. As a result, we recommend that in the next phase of this project, further interviews be conducted. In particular, a greater sampling of state and local election officials from different parts of the country should be interviewed. These individuals have first hand information and experience in the operation of elections.

We also recommend that in the next phase interviews be conducted with people in law enforcement, specifically Federal District Election Officers (“DEOs”)¹ and local district attorneys and attorneys defending those accused of election crimes or civil violations. In many instances it is the local district attorney who will investigate election fraud and suppression complaints. Attorneys who defend people accused of election crimes will have a different perspective on how the system is working to detect, prevent, and prosecute election fraud.

- **Conduct Follow-Up Nexis Research.** The Nexis search conducted for this phase of the research was based on a list of search terms agreed upon by both consultants. Thousands of articles were reviewed and hundreds analyzed. Many of the articles contain allegations of fraud or intimidation. Similarly, many of the articles contain information about investigations into such activities or even charges brought. However, without being able to go beyond the search terms, we

¹ The Public Integrity Section of the Criminal Division of the Department of Justice has all of the 93 U.S. Attorneys appoint Assistant U.S. Attorneys to serve as DEOs for two years. DEOs are required to screen and conduct preliminary investigations of complaints, in conjunction with the FBI and PIN, to determine whether they constitute potential election crimes and should become matters for investigation; oversee the investigation and prosecution of election fraud and other election crimes in their districts; coordinate their district’s (investigative and prosecutorial) efforts with DOJ headquarters prosecutors; coordinate election matters with state and local election and law enforcement officials and make them aware of their availability to assist with election-related matters; issue press releases to the public announcing the names and telephone numbers of DOJ and FBI officials to contact on election day with complaints about voting or election irregularities and answer telephones on election day to receive these complaints; and supervise a team of Assistant U.S. Attorneys and FBI special agents who are appointed to handle election-related allegations while the polls are open on election day. *Department of Justice’s Activities to Address Past Election-Related Voting Irregularities*: General Accounting Office, October 14, 2004, GAO-04-1041R

could not determine whether there was any action taken regarding the allegations, investigation or charges brought. Consequently, it is impossible to know if the article is just reporting on “talk” or what turns out to be a serious affront to the system. We recommend that follow up Nexis research be conducted to establish what, if any, resolutions or further activity there was in each case.

We also believe that in the second phase of this project, there should be a sampling of local newspapers from around the country to analyze for articles on voter fraud and voter intimidation. This will lead to a better idea of problems that occur on city and county levels that are often not reported statewide.

- **Conduct follow-up research to the literature reviews.** Similarly, many allegations are made in the reports and books that we analyzed and summarized. Those allegations are often not substantiated in any way and are inherently time limited by the date of the writing. Despite this, various interested parties frequently cite such reports and books as evidence of fraud or intimidation. Therefore, we recommend as a follow up to the literature review, an analysis of the resolution, if any, of specific instances of fraud and intimidation cited in the books and reports reviewed in the first phase.
- **Review a sampling of state district court cases.** In the first phase, we read and analyzed over 44,000 cases. Unfortunately, few of these were found to be on point. We therefore recommend that in the second phase, research should be concentrated on a national sampling of state district court level electoral cases. Often the district courts settle important issues that are not subsequently appealed. We believe that there could be a storehouse of information regarding vote fraud and intimidation in these cases.
- **Survey state election fraud and intimidation laws.** We recommend that there be a sampling of state electoral laws (including criminal penalty provisions), in order to aid in the development of model legislation that would address voter fraud and intimidation.
- **Review which states collect data on fraud and intimidation.** Evidently a few states, such as Arkansas and Georgia, collect and maintain data on complaints of fraud and intimidation and the disposition of those allegations at the state level. Phase two should examine what other states have such information and seek to obtain it for review and analysis. Policies and protocols on gathering such information in these states should also be looked at as possible models for the states that do not employ this practice.
- **Analyze data collected by various organizations in the 2006 election.** Several organizations, such as Election Protection, 1-800-MYVOTE1, and the parties will be setting up hotlines and sending people into the field during the upcoming mid-term elections both to assist voters and compile complete records of complaints and incidents from the period of voter registration through Election Day. Some of

these organizations have already agreed to share their data with the phase two EAC project consultants. We recommend that such data be used to the greatest extent possible to assess the incidence and the nature of the fraud and intimidation that occurred.

- **Obtain and analyze data retained by the Department of Justice.** Although according to a recent GAO report the Voting Section of the Civil Rights Division of the Department of Justice tracks complaints of voter intimidation in a variety of ways,ⁱ the Section was extremely reluctant to provide the consultants with useful information. Further attempts should be made to obtain relevant data. This includes the telephone logs of complaints the Section keeps and information from the database – the Interactive Case Management (ICM) system – the Section maintains on complaints received and the corresponding action taken. We also recommend that further research include a review and analysis of the observer and monitor field reports from Election Day that must be filed with the Section.
- **Obtain and analyze a sampling of DEO Reports.** Similarly, the consultants believe it would be useful for any further research to include a review of the reports that must be filed by every DEO to the Public Integrity Section of the Criminal Division of the Department of Justice. As noted above, the DEOs play a central role in receiving reports of voter fraud and investigating and pursuing them. Their reports would likely provide tremendous insight into what actually transpired during the last several elections. Where necessary, information could be redacted or kept confidential.
- **Attend the Department of Justice’s Ballot Access and Voting Integrity Symposium.** The consultants also believe it would be useful for any further activity in this area to include attendance at the next Ballot Access and Voting Integrity Symposium.² According to the Department, DEOs are required to attend annual training conferences centered on combating election fraud and voting rights abuses. These conferences sponsored by the Voting Section of the Civil Rights Division and the Public Integrity Section of the Criminal Division, feature presentations by civil rights officials and senior prosecutors from the Public Integrity Section and the U.S. Attorneys’ Offices.ⁱⁱ
- **Consult with an academic/academic institution with unimpeachable political science statistical research credentials.** Included in this report is a summary of

² By attending the symposium researchers could learn more about the following:

How *DEOs* are trained, e.g. what they are taught to focus their resources on; How they are instructed to respond to various types of complaints; How information about previous elections and voting issues is presented; and, How the Voting Rights Act, the criminal laws governing election fraud and intimidation, the National Voter Registration Act, and the Help America Vote Act are described and explained to participants.

various methodologies political scientists and others suggested to measure voter fraud and intimidation. While we note the skepticism of the Working Group in this regard, we nonetheless recommend that in order to further the mission of providing unbiased data, further activity in this area include an academic institution and/or individual that focuses on sound, statistical methods for political science research.

- **Review and Assess Whether Current Federal Laws on Fraud and Intimidation are Adequate.** Finally, we recommend that phase two project researchers review federal laws to explore ways to make it easier to impose either civil or criminal penalties for acts of intimidation that do not necessarily involve racial animus and/or a physical or economic threats.

According to Craig Donsanto, long-time director of the Public Integrity Section of the Criminal Division of the Department of Justice,

As with other statutes addressing voter intimidation, in the absence of any jurisprudence to the contrary, it is the Criminal Division's position that section 1973gg-10(1) applies only to intimidation which is accomplished through the use of threats of physical or economic duress. Voter "intimidation" accomplished through less drastic means may present violations of the Voting Rights Act, 42 U.S.C. § 1973i(b), which are enforced by the Civil Rights Division through noncriminal remedies.ⁱⁱⁱ

Mr. Donsanto reiterated these points to us on several occasions, including at the working group meeting.

The second phase of this project should examine if current laws can be revised or new laws drafted that would address voter intimidation that does not threaten the voter physically or financially, but rather threatens the voter's right to vote as *something of tangible value in itself*. Such legislation would penalize all forms of voter intimidation, regardless of the motivation. The law would, *for example*, potentially cover letters and postcards with contain language meant to deter voters from voting and pre-Election and Election Day challenges that are clearly illegitimate.

In the alternative to finding a way to penalize such behavior, researchers might examine ways to deter and punish voter intimidation under civil law. For example, there might be a private right of action created for voters or groups who have been subjected to intimidation tactics in the voting process. Such an action could be brought against individual offenders; any state or local actor where there is an unchecked pattern of repeated abuse; and organizations that intentionally engage in intimidating practices. Civil damage penalties and attorney fees should be included. Another, more modest measure, as has been suggested by Ana Henderson

and Christopher Edley,^{iv} would be to bring fines for violations under the Voting Rights Act up to parity. Currently, the penalty for fraud is \$10,000 while the penalty for acts to deprive the right to vote is \$5,000.

ⁱ *Department of Justice's Activities to Address Past Election-Related Voting Irregularities*: General Accounting Office, October 14, 2004, GAO-04-1041R, p. 4. This same report criticizes some of the procedures the Section used for these systems and urged the Department to improve upon them in time for the 2004 presidential election. No follow-up report has been done since that time to the best of our knowledge.

ⁱⁱ *Department Of Justice To Hold Ballot Access and Voting Integrity Symposium*: U.S. Department of Justice press release, August 2, 2005.

ⁱⁱⁱ Craig C. Donsanto, *Prosecution of Electoral Fraud Under United States Federal Law*, IFES Political Finance White Paper Series, 2006, p. 29.

^{iv} Ana Henderson and Christopher Edley, Jr., *Voting Rights Act Reauthorization: Research-Based Recommendations to Improve Voting Access*, Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity, University of California at Berkeley, School of Law, 2006, p. 29